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SUPREME COURT OF THE UNITED STATES

October Term 1961

NO. 761

LEE MODE ..... *Petitioner*

Vs.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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The petitioner, Lee Mode, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas affirming the conviction of petitioner of murder in the second degree.

OPINION BELOW

The opinion of the Supreme Court of the State of Arkansas in the first trial on this matter is reported in 231 Ark. 477, and the opinion of the Supreme Court of Arkansas in the second trial in this case and the order denying the rehearing thereon has not yet been reported. (Appendix, p. 13)

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered October 31, 1961 (Appendix, p. 13). The petition for rehearing was filed November 14, 1961, and was denied by the Supreme Court of Arkansas on the 4th day of December, 1961. The jurisdiction in this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether there was a denial of due process of law under the Fourteenth Amendment to the United States Constitution raised by the refusal of the Supreme Court of the State of Arkansas upon appeal to consider the sufficiency of the evidence for the conviction at the second trial of this cause under the rule of the "Law of the Case".

2. Whether there was a denial of due process of law under the Fourteenth Amendment of the United States Constitution by the refusal of the Supreme Court of the State of Arkansas to consider on the second appeal of this case assignments of error which were also raised in the appeal of the first trial, when those assignments were not considered, discussed or decided by the Supreme Court of the State of Arkansas on the first appeal.

STATEMENT

The federal question was raised by the petitioner for the first time before the Supreme Court of the State of Arkansas on a petition for rehearing following the appellate court's decision in the second appeal. It is at this stage of the case petitioner claims his rights were violated.

The petitioner was tried for murder in the first degree and was convicted in the Circuit Court of Conway County, Arkansas, for murder in the second degree. After a trial by jury on March 26, 1959, the petitioner took an appeal to the Supreme Court of Arkansas pursuant to Ark. Stats. Section 43-2708.[1]

In the first appeal to the Supreme Court of Arkansas, the petitioner urged and raised 64 grounds of error on the part of the trial court.

The petitioner in his brief to the Supreme Court of Arkansas on the first case argued only eight grounds to the appellate court, although 64 grounds for error were raised.

The Supreme court of Arkansas reversed the first conviction and remanded the case to the Circuit Court of Conway County, Arkansas, for a new trial. The majority of the Supreme Court of Arkansas in reversing and remanding the first conviction discussed one of the points argued

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[1]Ark. Stats. Section 43-2708 — Application to circuit court for appeal in certain cases. — When any person shall be convicted in any of the circuit courts of this State, for any offense other than a capital offense, or in any case in which a sentence has heretofore been imposed and execution suspended the circuit court in which such conviction is had, may grant the defendant an appeal to the Supreme Court.

by the petitioner which was the sufficiency of the evidence. On this point the Supreme Court of Arkansas held that the evidence at the first trial was sufficient to sustain the verdict and conviction and then went on to discuss one instruction that was given to the jury by the trial court and reversed the case on that particular point. Insofar as the remaining 62 grounds of error were concerned, the court made the general statement that several other points were argued in the briefs, all of which were examined but no further error was found. The Court did not consider all points of error raised.

The petitioner was re-tried before a jury in the Circuit Court of Conway County, Arkansas, and on October 24, 1960, was again convicted of murder in the second degree. The petitioner appealed the conviction for a second time to the Supreme Court of Arkansas. On this second appeal, the petitioner urged 61 grounds for error. Six of these errors were argued to the appellate court in petitioner's brief.

On October 30, 1961, the Supreme Court of Arkansas affirmed the second conviction. On the second appeal, one of the petitioner's grounds for error was that the evidence presented at the second trial was insufficient to sustain a conviction for second degree murder. The Arkansas Supreme Court in its majority opinion held that with only a few exceptions the assignments and the motion for a new trial in the second appeal were like the assignments of error urged in the first appeal and "since the evidence offered and rulings made were practically the same in both trials" the rule of the "Law of the Case" precluded the petitioner from urging any point that was assigned as error on the first appeal.

The evidence at both trials of this case is undisputed to the matter that on the 13th day of October, 1958, the petitioner was attacked by one D. L. Russell, in broad daylight on a public sidewalk in the downtown section of the City of Conway, Faulkner County, Arkansas. At the time of the fight the petitioner, Lee Mode, was a man 64 years old and in poor health and that the deceased, D. L. Russell, was in his middle 30's and very strong. The deceased had threatened to kill petitioner several times in the recent past, boasting that he could kill Mode with his hands. During the fight between these two men, D. L. Russell had his arms around petitioner and was struck by shots from a pistol held by petitioner, from which D. L. Russell died.

The testimony is also consistent in both trials that there had been bad blood between the petitioner and the deceased for some months, and that the deceased had made threatening gestures and statements toward the petitioner's life and that the petitioner was aware of these gestures and threats.

There were many witnesses testifying at the first trial, but only one person besides the petitioner testified as an actual eye witness to the shooting and the events immediately preceding the shooting. The name of this witness was Calvin Tyler. Mr. Tyler's testimony has been reproduced in full as given on the first trial in the Appendix at pages 39-44, and Mr. Tyler's testimony at the second trial appears in the appendix at pages 45-62.

For a clearer understanding of the importance and difference of the testimony at the two trials, we have reproduced photographs of the scene of the tragedy which were introduced by stipulation of the parties in both cases and

which appear in the original transcript of the second trial as Exhibit No. 6 and Exhibit No. 8.

The first photograph reproduced was introduced as Exhibit No. 6 in the second trial and is a view taken from the spot in Exhibit No. 6 just on the west side of the mouth of Spencer Street where the barber pole appears and is looking in an easterly direction, showing the side of the Farmers Supply Store on the Spencer Street side, looking east down Vanronkle Street in the City of Conway, Arkansas, and appears in the back of this petition.

The second photograph, which we will continue to call Exhibit No. 8, will show the court the front of a building called the Farmers Supply Store on Vanronkle Street in the City of Conway, which shows the scene looking in a westerly direction. The first street appearing in Exhibit 8 as entering from the northerly direction into Vanronkle and between Farmers Supply Store building and the first building immediately west is the mouth of Spencer Street. The third building displayed in Exhibit 8, which would be the dark red brick, two-story building, is the First National Bank building and appears in the back of this petition.

On the first trial, Mr. Calvin Tyler testified he was angling across Vanronkle going in a northwesterly direction towards the front of the Farmers Supply Store and when he was about 70 feet away from the point where the shooting took place, which occurred approximately where the "No Parking" sign appears in both Exhibits 6 and 8, he saw the deceased coming in an easterly direction down the sidewalk, nearly in front of the double door that enters Farmers Supply Store, when he saw the petitioner step from the doorway toward the deceased. The two men grappled and clinched. A shot was fired, and the deceased fell.

at which point the witness' son turned him around and took him from the scene (Appendix p. 40).

At the second trial of this case, Calvin Tyler's testimony was substantially different. Mr. Tyler testified he observed the petitioner walking down the sidewalk right near the corner of the Farmers Supply Store, going in a southeasterly direction and observed the deceased coming from the west of the petitioner down the sidewalk, walking behind the petitioner but in the same direction. That from the time he first noticed the two men until the time the deceased lay on the sidewalk some ten or fifteen seconds elapsed. That at the time he saw the two men in the positions described, the petitioner whirled around, faced the deceased, the two men came together and clinched. Two shots were fired. The deceased fell to the sidewalk and the witness' son turned him around and took him away from the scene (Appendix, pp. 48-49.)

We have already pointed out that at the first trial of this case, besides the testimony of Mr. Calvin Tyler, the only testimony of an actual eye witness to these events was the petitioner himself. At the second trial a man named Thomas Stone testified who was not called to testify at the first trial. To understand Mr. Stone's testimony, we call your attention back to the photograph reproduced and designated as Exhibit 8 and the two-story dark red brick bank building, two doors west of the Farmers Supply Store.

Mr. Stone testified that on the morning of October 13, 1958, he went to the First National Bank building and made a deposit. After he had completed his business in the bank, he walked out to the corner of the bank building on Vanronkle Street. As he stood on the corner by the bank he saw the petitioner come out of the mouth of Spencer Street.

turn on the sidewalk in front of Farmers Supply Store to go east when he passed the deceased standing on the west side of the mouth of Spencer Street and Vanronkle and heard deceased call out to the petitioner, "Hey, there old man." That the deceased was also going in an easterly direction. That the petitioner turned around approximately at the point where the "No Parking" sign appears in Exhibit 8. That when the petitioner turned around, the deceased rushed up to him and the two men went into a clinch and after a scuffle, he heard two shots fired and saw the deceased fall to the sidewalk (Appendix, pp. 62-81)

The balance of the testimony at both trials covered previous fights and altercations between the petitioner and the deceased and explored the ill feeling and bad blood between the petitioner and the deceased

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of the State of Arkansas erred

1. In refusing to re-examine the sufficiency of the evidence taken at the second trial of this case when there was a substantial and clear difference in the material evidence presented and the appellate court in doing so denied the petitioner due process of law as guaranteed under the Fourteenth Amendment to the Constitution of the United States.

2 In refusing to consider those assignments of error raised by the petitioner in the second appeal of this case on the ground that the rule of "Law of the Case" foreclosed the petitioner from raising these assignments of error a second time when 62 of those assignments of error were not discussed or decided by the appellate court on the first appeal and by doing so denied the petitioner due process of law as granted under the Fourteenth Amendment to the Constitution of the United States of America.

REASONS FOR GRANTING

1.

The federal question appears for the first time in the petition for rehearing filed with the Supreme Court of the State of Arkansas following that appellate court's decision in the second appeal. There are no prior decisions of the Arkansas Supreme Court in criminal cases from which the petitioner could reasonably have anticipated that the appellate court would refuse to consider a sufficiency of evidence since it was materially and substantially different from the testimony on the first trial of this case which is on appeal. The federal question was also argued by the petitioner in his brief filed in support of the petition for rehearing.

While the order of the Supreme Court of the State of Arkansas denying the petition for rehearing did not specifically note that the appellate court had considered the federal question raised, subsequently the petitioner obtained a certification from the Chief Justice of the Supreme Court of Arkansas that the federal question was considered by the full court in denying the petition for rehearing and it is our position that this question has been seasonably and explicitly raised and disposed of by the highest court in the State of Arkansas. (Appendix pp. 112-113)

The State of Arkansas through its legislature has provided for an appeal in criminal cases from the trial court to the Supreme Court in Ark. Stats., Section 43-2708 [2]

The petitioner could not expect the United States Supreme Court to lend its judicial power to a matter unless the

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[2](Ark. Stats., Sec. 43-2708 quoted on page 3 of this brief.)

defects complained of as constituting a denial of due process, when corrected would lead to a substantially different result than they achieved through the denial. With this in mind, we have tried to strip this case and the questions presented of all fat and arrive at the elementary facts.

The evidence in the second trial revolves around a span of time covering from ten to fifteen seconds where the petitioner, a half-blind, sick, old man of 64 years was suddenly accosted and attacked on a public street from the rear by a young, strong, healthy, robust adversary in his middle 30's, who had sworn to kill him and who after accosting the petitioner without notice from the rear rushes to the petitioner, threw one arm around the petitioner's neck and began to grapple with petitioner who had to hold on to a "No Parking" sign to keep from being thrown to the ground and in order to protect himself in the heat of the attack, the petitioner shot and killed the decedent.

There was no testimony in the record that the petitioner saw the deceased prior to the moment when the deceased called out "Hey, there old man", and the petitioner under these circumstances turned around to find a person of whom he was afraid. This evidence adduced in this trial could not possibly point to the conclusion that the petitioner was guilty of murder, that he was the aggressor or that he was seeking the decedent to take his life or was lying in wait as the evidence on the first trial has indicated.

It is clear from the testimony and the record that the deceased brought on the altercation, that he rushed up and attacked the petitioner and grappled with him. The Arkansas Supreme Court in *Biddle vs. State*, 131 Ark. 537, stated the law of self-defense that it has consistently followed and said:

"In a prosecution for homicide where the defendant fired the fatal shot under the belief that it was necessary in order to protect himself from current harm and he fired the shot for that purpose, he should be acquitted although the jury believed that the accused was mistaken in his conclusion as to the danger to himself."

The evidence that we are concentrating on points to the deceased as the aggressor who had threatened death to the petitioner. We submit that if the Supreme Court of the State of Arkansas had considered the evidence adduced in the second trial surrounding the fatal fight that it would have concluded the petitioner's action to have been involuntary manslaughter under Ark. Stats. Section 41-2209,[3] or justifiable homicide under Ark. Stats. Section 41-2231,[4] rather than murder in the second degree under Ark. Stats. Section 41-2206[5]

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[3]Ark. Stats., Section 41-2209. — Involuntary manslaughter defined. — If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. Provided further that when the death of any person ensues within one (1) year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter.

[4]Ark. Stats. Section 41-2231. — Justifiable homicide defined. — Justifiable homicide is the killing of a human being in self-defense, or in defense of habitation, person or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony.

[5]Ark. Stats. Section 41-2206 — Murder in second degree — All other murder shall be deemed murder in the second degree.

The evidence adduced, if examined by the appellate court, should have produced a ruling that the trial court erred in not directing a verdict for the petitioner on the ground that the killing was justifiably done in self-defense.

From a study of the prior decisions of the United States Supreme Court, there appear many decisions discussing the rule of "Law of the Case". However, we have been unable to discover a decision squarely in point with the questions raised in the petition, but this case does raise a problem of practice and procedure in appellate courts throughout the United States and must occur in criminal cases with some frequency. The legislature of the State of Arkansas partially recognized this problem in enacting the [illegible] of Ark. Stats. Section 43-2723.*

This statute makes it mandatory in convictions where a capital offense is involved that the appellate court review the entire record for prejudicial error before confirming conviction whether or not such error was argued by the defendant on the appeal.

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*Ark. Stats. Section 43-2723. Trial of capital cases. — In all cases appealed from the circuit courts of this State to the Supreme Court, or prosecuted in the Supreme Court upon writs of error, where the appellant has been convicted in the lower court of a capital offense, all errors of the lower court prejudicial to the rights of the appellant shall be heard and considered by the Supreme Court whether exceptions were saved in the lower court or not; and if the Supreme Court finds that prejudicial error was committed by the trial court in the trial of any case in which a conviction of a capital offense resulted, such cause shall be reversed and remanded for a new trial, or the judgment modified at the discretion of the court.

The prime reasons relied upon by this petitioner as grounds for the prayer for a writ of certiorari are:

1. The laws of Arkansas permitted and granted both appeals to the State Supreme Court and the Supreme Court is bound to treat and consider the appeals in such a manner that it does not deny the petitioner due process of law under the Fourteenth Amendment to the United States Constitution.

2. By foreclosing consideration of the errors urged on appeal and in foreclosing the consideration of the evidence relied upon for the conviction of the petitioner both under the rule of "Law of the Case" when most of the errors raised on the first appeal were not considered and the evidence of the second appeal was substantially and materially different than the evidence in the first appeal the Supreme Court of Arkansas in effect and in fact made the second appeal a restricted and useless procedure in violation of the historic sense of justice and fair play which is traditional in this nation. An appeal which is rendered thus inert is no appeal at all. It has the general effect of leading the horse to water and refusing to let him drink.

These questions of law presented in this petition should be made crystal clear for all appellants who follow whose lives and liberty hang in the balance. The Arkansas Supreme Court in shielding from its view the evidence in the second trial which is also the substance of any trial denied and avoided the responsibility of monitoring the actions of

the lower courts. This denial is repugnant to the American concept of justice.

Petitioner urges that the United States Supreme Court grant the writ of certiorari to afford the petitioner the opportunity to pursue correction of these errors.

Respectfully submitted,

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